IN THE

Supreme Court of the United States

October Term, 1966

No. ~~744~~ 93

PATRICIA WALDRON, as executrix of the last will and testament of GERALD B. WALDRON, Deceased,

Petitioner,

v.

CITIES SERVICE CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled action on June 6, 1966.

Citations to Opinions Below

The opinion of the District Court (Pltf.'s App. 5a)* is reported at 38 F.R.D. 170 (S.D.N.Y. 1965) and is printed in Appendix B hereto, *infra*, p. 40. The opinion of the Court of Appeals is reported at 361 F.2d 671 (2d Cir. 1966) and is printed in Appendix B hereto, *infra*, p. 36.

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* Parenthetical references are to the appendices of the parties in the court below.

Jurisdiction

The judgment of the Court of Appeals was entered on June 6, 1966.* The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. In a private antitrust action where the only source of direct evidence of the conspiracy rests in defendants' files, when one of the defendants moves for summary judgment under rule 56(b), Fed. R. Civ. P., is the burden upon the defendant to show that there is no genuine issue as to any material fact for trial under rule 56(c) or is the burden upon the plaintiff to show that there is such an issue under rule 56(e)?

2. In such an action, is it an abuse of discretion to stay plaintiff from all discovery while he and each of his associates is exhaustively examined by the defendants, one after the other, and then accord him only a limited discovery of the moving defendant in aid of his opposition to the latter's motion for summary judgment?

3. Did plaintiff, in fact, sustain the burden of showing genuine issues for trial on the limited record at his disposal?

Statutes Involved

The statutory provision involved is rule 56 of the Federal Rules of Civil Procedure, 28 U.S.C. App. following §2718 (1964). Rule 56 is printed in Appendix A, *infra*, p. 33.

* On August 29, 1966, an order was signed by Mr. Justice Harlan extending until November 3, 1966 petitioner's time to file this petition.

Statement of the Case

This is a private antitrust action brought to recover $109,260,000 as treble damages sustained by plaintiff* as the result of defendants' conspiracy to boycott all dealings in Iranian oil following nationalization of Iran's oil industry in 1951. The original defendants below were six major international oil companies, British Petroleum Co., Ltd. (the former Anglo-Iranian Oil Company, which held the concession for Iranian oil prior to nationalization), Socony Mobil Oil Co., Inc., Standard Oil Co. of California, Standard Oil Co. (New Jersey), Texaco Inc., Gulf Oil Corp. (each of which also held substantial oil concessions in the Middle East), and the respondent, Cities Service Co., which, plaintiff alleges, joined the conspiracy to boycott Iranian oil. The complaint is patterned after the complaint in a civil action, *United States* v. *Standard Oil Co. (New Jersey) et al., Civil Action* No. 86-27 (S.D.N.Y.), brought by the United States to break up the Middle Eastern oil cartel operated by the defendants other than Cities.

Following the nationalization of Iran's petroleum resources, the British adopted a policy of starving the Iranians into submission by placing an embargo on British goods and boycotting Iranian oil (Pltf.'s App. 23a, 119a). Each of the defendants other than Cities (which had no Middle Eastern reserves) respected the British position that Iranian oil was "stolen" property, and not only refused to purchase Iranian oil but cooperated in making up the deficiency of oil from other sources (Pltf.'s App. 79a, 119a).

In these circumstances, plaintiff and his associates met with Prime Minister Mossadegh and, on May 25, 1952,

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* Plaintiff died after suit was commenced and his widow as executrix has been substituted as plaintiff. We shall refer to plaintiff as if the decedent were still alive.

secured a contract from the National Iranian Oil Company which enabled them to purchase 15 million tons of Iranian oil over five years at prices substantially below the posted price for the Gulf of Persia and gave them the exclusive right to sell Iranian oil in the United States (Pltf.'s App. 90-92a). The contract was taken in the name of Consolidated Brokerage (Pltf.'s App. 86a).

Returning to New York, plaintiff and his associates contacted numerous companies, large and small, in an effort to sell their oil. In each instance, however, they were met with refusal, most often on the ground that the prospective purchaser was unwilling to deal in Iranian oil because of the threat of reprisal from the cartel companies, upon which they depended for long range supplies of oil. (Pltf.'s App. 92-101a).

After initial efforts to sell Iranian oil proved fruitless, plaintiff was introduced to Cities Service. Although a substantial company, Cities was at the mercy of the cartel because Cities owned less than half of the crude production needed to meet its daily requirements. It had been trying for years to obtain foreign production but had not succeeded. Its shortage of crude oil amounted to some 100,000 barrels per day. (Pltf.'s App. 131-32a).

On June 11, 1952, plaintiff's associates met for the first time with two Cities vice presidents. Early in these discussions, Cities expressed an interest in taking over the management of the Iranian installations. To this end, Cities desired an invitation from Prime Minister Mossadegh to W. Alton Jones, Cities' chairman of the board, to inspect the Iranian facilities with a view to their reactivation. (Pltf.'s App. 101-02a).

If the management deal went through, plaintiff's group was to receive as compensation one or two cents per barrel

on all of the oil or products taken out of Iran. In addition, plaintiff's contract was to be taken over, and there would be other fringe benefits for plaintiff's group. (*Ibid.*).

Plaintiff, armed with a draft prepared by Cities, again flew to Tehran, met with Prime Minister Mossadegh, and obtained the desired invitation. The invitation was delivered in New York on July 31, 1952, and Cities began immediate preparations for the inspection trip. (Pltf.'s App. 62a, n. 16; 102a).

In this connection Burl S. Watson, senior vice president, prepared a "secret" memorandum setting forth an outline for the formation of a management company, controlled by Cities and excluding any cartel companies, which would reopen the Iranian oil industry and receive a long term option to purchase crude oil at discount prices, as well as a first refusal on any future concessions for oil exploration in Iran (Pltf.'s App. 139a). As Watson later testified, Cities was looking for an opportunity to secure a long range supply of crude oil at production costs approaching the lowest in the world (Pltf.'s App. 133a).

On August 16, 1952, plaintiff flew to Tehran to make arrangements for living accommodations for the Cities Service party, consisting of Jones (chairman of the board), Heston (head of crude production), Frame (head of refining), Whetsel (manager of foreign operations), and Robeson (Jones' secretary) (Pltf.'s App. 103a).

On the way to Iran, Jones stopped at The Hague, where he conferred for five days with Jan Sandberg (Pltf.'s App. 155a). According to Watson, Sandberg was a member of the finance committee of Royal Dutch/Shell, a major international oil company, named in the amended complaint as one of the co-conspirators (Deft.'s App. 425a). No member of the Jones party participated in these conferences,

and no memorandum of them has been disclosed to plaintiff. Jones also telephoned Watson from The Hague to find out how many tankers would be available to Cities to move Iranian oil to the United States. Watson cabled a coded response, saying that Cities could transport 200,000 barrels a day by the end of 1954 (Pltf.'s App. 141a).

Arriving in Tehran on August 25, Jones and his party remained for approximately three weeks. Frame inspected the refinery at Abadan and found it in good shape, well-maintained since the departure of the British. Heston inspected the oil fields and found them in good condition, capable of producing a million barrels a day. Whetsel inspected the docks and loading facilities at Abadan, which he found ready for shoal-draft vessels, and the port of Bandar Mashur, which he found ready to receive deep-draft vessels (Pltf.'s App. 138a).

During their stay in Iran, Jones' assistants began preparation of a report on their inspection of the Iranian oil facilities. After several drafts, Jones added his recommendations to the final version, dated October 31, 1952 (Deft.'s App. 1a). This report concluded that two solutions to the Iranian oil problem were possible. The first, contemplating full, quick reactivation of the industry, required British cooperation, and, to this end, Jones proposed an arbitration panel comprised of British and Iranian representatives with "an experienced U.S. oilman" as chairman (Deft.'s App. 36-37a). Jones' alternative suggestion, to be put into effect if British cooperation was not forthcoming, called for the National Iranian Oil Company to enter into a long term agreement with "an American oil company" to purchase Iranian crude and develop the industry over a longer period of time (Deft.'s App. 37a).

On the return to the United States, while the group was in Paris, Carter, one of Waldron's associates, requested

Jones' assistance in persuading Secretary of the Interior, Oscar Chapman, who headed the Petroleum Administration for Defense, to support a proposed sale of Iranian aviation gasoline to the United States Air Force under plaintiff's contract. Such a sale might well have broken the blockade of Iranian oil. Jones, who fully recognized the importance of the proposed sale, told Carter that he approved the plan and would telephone Watson in New York to call Secretary Chapman. Instead, behind Carter's back, Jones cabled Watson to kill the deal. (Pltf.'s App. 147-49a). A few days later, Waldron was informed by Watson that Cities had no interest in Iranian oil. No explanation was offered. (Pltf.'s App. 146a).

History repeated itself in the Fall of 1953, when Richfield Oil Company, which was jointly owned by Cities (⅓), Sinclair (⅓) and the public (⅓), turned down plaintiff's offer to supply Iranian crude oil to make up its shortage at a most favorable price, again, without explanation (Pltf.'s App. 112-13a).

In May 1954, it came to Waldron's attention that in January 1953, Cities had made a contract with Gulf (one of the members of the cartel) for the purchase of 90 million barrels of Kuwait oil at a dollar a barrel, to be delivered at the rate of 20,000 barrels per day, with an option for still larger deliveries (Deft.'s App. 253a). It was not until Frame was deposed in 1964, however, that plaintiff learned that, while the Cities party was in Iran in August 1952, Jones had made a secret trip to Kuwait, where British Petroleum and Gulf share the oil concession. Before this information came out on Frame's deposition, the fact of such a trip was explicitly denied; it was characterized by counsel as "non-existent."

Recognizing, finally, that he could never sell any Iranian oil in the United States, plaintiff brought suit against

Cities and the cartel companies. In his complaint, which was filed on June 11, 1956, plaintiff alleged that Cities joined the other defendants in their conspiracy to boycott Iranian oil and to prevent plaintiff from exploiting his contract and that, in return, Cities received a huge quantity of Kuwait oil far below the posted price and the opportunity to participate in the Consortium which eventually took over the Iranian oil industry (Deft.'s App. 60-61a).

Before plaintiff could do anything with his complaint, defendants secured an order extending their time to answer until after they had had an opportunity to examine him, and, in the meantime, staying him from all discovery. (Pltf.'s App. 55a).

Plaintiff's deposition commenced on September 10, 1956. After he had been deposed for 62 days (comprising more than 4200 printed pages of testimony) and 825 exhibits had been marked, plaintiff moved to terminate the deposition upon the ground that defendants could no longer claim that they did not know him or the basis for his claim, and that, in consequence, the time had come when the complaint should be answered and plaintiff be permitted to have his own discovery like any other litigant. Not only did the court deny plaintiff's motion but it granted defendants 52 additional days to conclude their deposition of plaintiff and 174½ days more to depose his associates. In the meantime, the stay against any discovery by plaintiff was continued. None of the defendants had cross-moved or asked for any such relief. The order, signed on February 11, 1958, has since been cited by Professor Moore as the classic example of the means by which powerful defendants can abuse the discovery process and "stymie the action for an inordinate length of time." 4 MOORE, FEDERAL PRACTICE ¶26.13[2], at 1151-2 (2d ed. 1963).

When, finally, defendants had fully deposed plaintiff and each of his associates (except Carter) and had examined all of their papers, all of the defendants (except Cities) moved on November 1, 1963 for summary judgment upon the ground that plaintiff was disqualified by his own conduct from resort to the court and, further, that plaintiff was not injured in his business or property within the meaning of Section 4 of the Clayton Act (15 U.S.C. §15). The motion was denied (Pltf.'s App. 21a). The opinion is reported as *Waldron* v. *British Petroleum Co.*, 231 F.Supp. 74 (S.D.N.Y. 1964).

Cities' motion for summary judgment had been made earlier, on April 8, 1960, following completion of Cities' examination of plaintiff, and was still pending when the other defendants moved. The motion was supported by the affidavit of George H. Hill, Jr., soon to become Cities' general counsel. The affidavit and supporting documents sought to establish only that the Kuwait contract and the Consortium participation were not payoffs for any conspiracy (Deft.'s App. 146a, 371a). Cities did not submit an affidavit by any officer which denied participation by Cities in the conspiracy to boycott Iranian oil. W. Alton Jones, the only man who had full personal knowledge of everything Cities did with respect to Iran, remained silent. Plaintiff's allegations of conspiracy remain uncontradicted by pleading or affidavit to this day. While the motion was pending, plaintiff amended his complaint to allege simply that, at a date unknown to plaintiff, Cities joined the conspiracy to boycott Iranian oil (Pltf.'s App. 78a, 80a). Cities has ignored even the existence of the amended pleading and has never denied its allegation of conspiracy.

Upon the argument of the motion, plaintiff asked to be relieved of the stay which had prevented him from conducting discovery proceedings so that he might examine

Cities, beginning with W. Alton Jones, in aid of his opposition to the motion under rule 56(f). R. V. Whetsel, manager of Cities' Foreign Department, who traveled to Iran with Jones and actively sought participation in Iran by Cities, had already been lost to plaintiff by death on January 12, 1960. (Pltf.'s App. 131a).

About a year later, on March 30, 1961, the court announced that the motion would be considered adjourned so as to permit plaintiff to conduct pre-trial discovery in aid of his opposition to the motion (Pltf.'s App. 70a), but at a stage of the proceedings when plaintiff had had no discovery at all, the court expressed the opinion that the case against Cities "was based only on suspicion and on a gossamer inference drawn from the mere sequence of events," and announced that plaintiff's discovery would be narrowly limited (Pltf.'s App. 71-72a).

Responding to this obvious invitation, counsel for Cities argued that only one witness, George H. Hill, Jr., who had never dealt with plaintiff and had had little, if anything, to do with Cities' Iranian project, should be deposed and that only two subjects, the alleged "payoffs" for the conspiracy, should be explored. Saying that it would not "permit the plaintiff to conduct the kind of examination that ordinarily is permitted under Rule 26 and the related rules"; that, instead, it was "looking through the telescope at the other end . . . starting out with a narrow examination and then, as occasion may warrant," enlarging the examination, the court agreed to the proposed limitation of plaintiff's discovery. It was in vain that plaintiff renewed his request to examine W. Alton Jones. (Pltf.'s App. 68-70a).

The result could hardly have been more stultifying. Hill's examination proved nothing because Hill knew nothing, not having been a participant in the Iranian ven-

ture and not having been privy to Jones' thoughts and plans nor adequately informed as to Jones' activities. While this sterile exercise was going on, Jones, who knew all there was to be known about Cities' Iranian interests and what happend to them, was killed in an airplane crash.

In the circumstances, plaintiff, in May 1963, moved again for discovery under rule 56(f) in aid of his opposition to Cities' motion for summary judgment, asking specifically, this time, for the written statements which had been prepared in 1956 by Jones and his Cities Service colleagues concerning the Iranian project and for their underlying files. Cities, of course, urged that summary judgment should now be entered in its favor without further discovery. The court again held the motion under advisement for about a year until, on June 23, 1964, it granted plaintiff further but still limited discovery in aid of his opposition to Cities' motion for summary judgment (Pltf.'s App. 55-58a).

The examination of the three surviving Cities Service executives, Watson, Frame and Heston, which followed in the summer of 1964, threw a great deal more light on Cities' 1952 Iranian project, revealing, for the first time, that Cities had concluded that it could reactivate the Iranian oil industry over a period of years; that W. Alton Jones had visited representatives of the Middle Eastern oil cartel; and that Jones had secretly torpedoed plaintiff's efforts to break the blockade by means of a shipment of aviation gasoline (Pltf.'s App. 143a, 155a, 147-49a). The examination left unanswered, however, the question why, after going so far, Cities turned aside. The order was restricted in subject matter (Pltf.'s App. 156-57a). It was restricted in time to the period June 11, 1952 to November 1, 1952, even though Cities was permitted to rely upon selected documents subsequent to this period (Pltf.'s App. 17-20a).

The same dance was then repeated for the third time: plaintiff moved for further discovery not only of Cities but of the other defendants and of Carter (Pltf.'s App. 126-127a); Cities urged that summary judgment be granted without further discovery. Argument took place on February 9, 1965, and on September 8, 1965, the court granted Cities' motion and denied plaintiff's cross-motion for further discovery of Cities, Carter and the other defendants (Pltf.'s App. 17a).

REASONS FOR GRANTING THE WRIT

Summary of Argument

Plaintiff contends that, initially at least, the burden rested on Cities to demonstrate that there was no genuine issue of fact to be tried. Under the authorities, Cities could not even begin to sustain that burden without denying its participation in the conspiracy. This Cities never did. In shifting to plaintiff the burden of demonstrating the existence of a genuine issue of fact, the courts below committed error, and their decisions in that respect conflict with decisions of this Court and decisions rendered by courts of other circuits. (Point I, *infra.*)

Plaintiff contends, further, that in limiting the scope of plaintiff's discovery, the courts below acted beyond their authority. Plaintiffs in civil antitrust actions should be given wide, not narrow, discovery. Any plaintiff is entitled to liberal discovery on an issue of conspiracy for which the only source of evidence is defendants' files and testimony. In refusing such discovery, the courts below so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. (Point II, *infra.*)

Plaintiff contends, finally, that no matter who had the burden of showing the existence of a triable issue, summary judgment should not have been granted because, even on the underdeveloped record at his disposal, plaintiff demonstrated the existence of genuine issues of material fact with regard to Cities' participation in the conspiracy. (Point III, *infra.*)

POINT I

In relieving defendant of the burden of demonstrating the absence of a genuine issue of fact on its motion for summary judgment, and imposing the converse burden on plaintiff, the lower courts made a decision in conflict with decisions of other circuits.

Since the adoption of the Federal Rules of Civil Procedure, it has been consistently held that, on any motion for summary judgment under rule 56, the moving party has the burden of positively and clearly demonstrating that there is no genuine issue of fact to be tried. *National Screen Service Corp.* v. *Poster Exchange, Inc.,* 305 F.2d 647, 651 (5th Cir. 1962); *Evers* v. *Buxbaum,* 253 F.2d 356, 357 (D.C. Cir. 1958); *Caylor* v. *Virden,* 217 F.2d 739, 741 (8th Cir. 1955); *Byrnes* v. *Mutual Life Ins. Co. of N.Y.,* 217 F.2d 497, 501 (9th Cir. 1954), *cert. denied* 348 U.S. 971 (1955); *Albert Dickenson Co.* v. *Mellos Peanut Co.,* 179 F.2d 265, 268 (7th Cir. 1950); *Walling* v. *Fairmont Creamery Co.,* 139 F.2d 318, 322 (8th Cir. 1943). Under this rule, it is not incumbent upon the adverse party to show that summary judgment should not be entered, *Driggers* v. *Business Men's Assur. Co.,* 219 F.2d 292, 299 (5th Cir. 1955), and if the moving affidavits fail to deny the crucial allegations of the complaint in explicit terms, the motion must be denied. *Slagle* v. *United States,* 228 F.2d 673, 678

(5th Cir. 1956); *Woods Exploration & Prod. Co.* v. *Aluminum Co. of America,* 36 F.R.D. 107, 110 (S.D. Texas 1963); *Fuimara* v. *Texaco Inc.,* 204 F.Supp. 544, 550 (E.D. Pa. 1962), *aff'd* 310 F.2d 737 (3d Cir. 1962); *Long Island Railroad Co.* v. *New York Cent. R. Co.,* 26 F.R.D. 145, 147 (E.D.N.Y. 1960); *United States* v. *General Ry. Signal Co.,* 110 F.Supp. 422, 425 (W.D.N.Y. 1952). Thus, in *Long Island Railroad Co.* v. *New York Cent. R. Co., supra,* the court, in denying defendant's motion for summary judgment, said:

> "It is true that plaintiffs have failed to specify the facts which they contend to be in dispute, but the burden is upon the moving party to establish the facts with respect to which there is no dispute and not upon the other party to establish the facts that are in dispute. In other words, the defendant upon this motion has the burden of establishing the negative, and the plaintiffs do not have the burden of establishing the affirmative." 26 F.R.D. at 147.

Cities has neither denied by pleading nor affidavit the allegations of conspiracy set forth in the complaint. When Cities made its motion for summary judgment on April 8, 1960, it submitted an affidavit by George H. Hill, Jr., an officer who was familiar with the Cities-Gulf contract for Kuwait oil and with Cities' participation in the Iranian Consortium. The Kuwait contract and the Consortium were the two items which plaintiff had alleged in his original complaint as the payoffs for Cities' joining the conspiracy to boycott Iranian oil. Hill's affidavit and the accompanying documents attempted to establish that neither Kuwait nor the Consortium were payoffs for joining the conspiracy (Deft.'s App. 146-411a). Hill never denied that Cities had joined the conspiracy, nor has any other officer of Cities ever filed an affidavit containing such a denial. From 1960 until his death in 1962, W. Alton Jones, the

one Cities executive who had personal knowledge of everything Cities did with respect to Iran, submitted no affidavit denying Cities' part in the conspiracy. He submitted no affidavit on any issue in the case, and plaintiff's attempts to depose him were tenaciously and successfully opposed by Cities.

Effective July 1, 1963, rule 56(e) was amended to add the following two sentences:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not respond, summary judgment, if appropriate, shall be entered against him."

The notes of the Advisory Committee explained that the purpose of the amendment was to overturn a line of cases in the Third Circuit in which properly documented motions for summary judgment were denied when an issue of fact was presented by the pleadings. The Advisory Committee's notes concluded with the statement that the amendment was not intended "to affect the ordinary standards applicable to the summary judgment motion," and that, "Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied *even if no opposing evidentiary matter is presented.*" 28 U.S.C.A., Rules 52-58, 1965 Supp., p. 85. (Emphasis added.) Thus, the Advisory Committee clearly stated its intention that the strict burden upon the moving party to establish the absence of any genuine issue as to a material fact was not to be disturbed.

Despite this clear statement of the purpose of the amendment, the language of the amendment drew a sharp dissent

from Professor Moore, who expressed concern that the amendment would be more broadly construed than intended so as to shift the burden of persuasion on a motion for summary judgment from the moving to the opposing party. MOORE'S MANUAL §17.10[3], at 1290-91 (1963). Professor Moore's fear that the amendment would be used to alter the burden on summary judgment motions has been borne out in the present case. In 1961, the district court below noted that, "But for the prevailing strict policy in this circuit with respect to the invocation of the summary judgment procedure, the court would have granted the motion." (Pltf.'s App. 71a). In 1964, however, the district court seized upon the rule 56(e) amendment to place the burden upon plaintiff, saying, ". . . plaintiff must—if he is to oppose successfully Cities Service's summary judgment—eventually submit 'specific facts' which 'would be admissible in evidence' [Rule 56(e)] . . ." (Pltf.'s App. 58a). No mention was made by the court of the fact that Cities had never, by affidavit or pleading, denied that it had conspired against plaintiff; instead, plaintiff was compelled to prove affirmatively that the conspiracy existed.

In its final opinion, the district court found that plaintiff had failed to meet "the new demands of Rule 56(e)" and granted Cities' motion for summary judgment (Pltf.'s App. 10a). In affirming, the Court of Appeals adopted the position of the district court that the amendment to rule 56(e) had shifted the burden of proof to the adverse party, and noted that, "it is plain that the *plaintiff* has not established the existence of any 'genuine issue as to any material fact.'" (Appendix B, p. 38, *infra.*) (Emphasis added.)

The action of the courts below squarely raises for this Court's consideration the important question of determining the standards which are to be applied on motions

for summary judgment. The Second Circuit has ruled in this case that the amendment to rule 56(e) shifted the burden of proof on summary judgment motions so as to require the opposing party to demonstrate the existence of an issue of fact and to relieve the moving party of any requirement to demonstrate the absence of any issue of fact. That ruling is in conflict with decisions of other circuits, which, since the amendment became effective, have continued to require the moving party to establish the lack of a genuine issue of fact before the opposing party is required to set forth evidentiary data showing the existence of such an issue. *Associated Hardware Sup. Co.* v. *Big Wheel Dist. Co.*, 355 F.2d 114, 121 (3d Cir. 1966); *Scott* v. *Great Atlantic & Pac. Tea Co.*, 338 F.2d 661, 662 (5th Cir. 1964); *Jacobson* v. *Maryland Cas. Co.*, 336 F.2d 72, 74 (8th Cir. 1964), *cert. denied* 379 U.S. 964 (1965); *Castlegate, Inc.* v. *National Tea Co.*, 34 F.R.D. 221, 229 (D. Colo. 1963). In *Susman* v. *South Texas Package Stores Assoc.*, 33 F.R.D. 340 (S.D. Tex. 1963), the court addressed itself to the argument that the 56(e) amendment cast a greater burden on the party opposing summary judgment:

> "Defendant-wholesalers' positions apparently are that the italicized portion of the amended rule places a greater burden on plaintiffs than did the earlier version. The Court is of the opinion that defendants read more into the rule than was intended. The comments of the Advisory Committee *expressly deny that the changes were designed to affect the ordinary standards applicable to the summary judgment motion.*" 33 F.R.D. at 347. (Emphasis in original.)

The present case, a private treble-damage antitrust action, is a classic example of the impropriety of placing the burden of proof upon the party opposing summary judgment. By failing to deny the allegation of conspiracy

and taking issue only with plaintiff's allegations as to the precise motivation for its joining the conspiracy, Cities was able to submit the affidavit of an executive who knew nothing at all about Cities' Iranian venture and whose sole concern was Cities' dealings relating to the Kuwait contract and the Consortium, and thus avoid submitting the affidavit of the only man in its organization who knew all of the facts at first hand. If Cities had attempted to satisfy the burden of proving the absence of any material issue of fact with respect to the conspiracy from an overall point of view, it would have been forced to submit the affidavit of W. Alton Jones, Cities' chairman of the board. Of course, if Jones had submitted an affidavit, then in all likelihood the district court would have permitted plaintiff to depose him. Cities did not want Jones deposed at that time; it was still concealing the facts that Jones had conferred with a representative of Shell (named as a co-conspirator) on his way to Iran; that he had visited Anglo-Iranian and Gulf in Kuwait; and that he had torpedoed plaintiff's efforts to sell Iranian aviation gasoline. When, finally, the court in 1964 permitted plaintiff to depose Cities' executives who had some knowledge of the Iranian plans, Jones was dead. There was no real substitute for Jones. His associates were not only reluctant to make admissions damaging to their company, but could, and did, claim ignorance of Jones' activities. (Pltf.'s App. 150a). Cities was thus able to enjoy the full benefit of having failed to produce an affidavit or testimony denying the crucial material fact, conspiracy.

By placing the burden of proof upon plaintiff, the court forced plaintiff to bear the consequences of Jones' silence. That ruling, we respectfully submit, flies in the face of this Court's holding in *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962), that even where full discovery by all parties has been allowed, sum-

mary judgment "should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."

POINT II

The courts below erred in limiting plaintiff's discovery.

Even if the courts below were right in deciding that rule 56(e), as amended, shifted the burden of proof on motions for summary judgment, the case at Bar presents another important question as to the standards to be applied in granting discovery applications under rule 56(f) to adverse parties who must seek the required proof through discovery.

The rules have been liberally construed in antitrust cases to permit wide discovery, not only because of the element of public interest in private antitrust actions, *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 329 (1955); *Bales* v. *Kansas City Star Co.*, 336 F.2d 439, 443 (8th Cir. 1964), but also because of the very nature of the alleged antitrust conspiracy, in which the only source of evidence open to plaintiff is the defendants themselves. *Leonia Amusement Corp.* v. *Loew's Inc.*, 16 F.R.D. 583, 584 (S.D.N.Y. 1954); *United States* v. *General Ry. Signal Co.*, 110 F.Supp. 422, 423 (W.D.N.Y. 1952).

When, before the plaintiff has had an opportunity to engage in discovery, an antitrust defendant moves for summary judgment on the ground that there is no merit to plaintiff's claim, the plaintiff will often be unable to marshal in opposition to the motion all of the evidence which supports his claim, for much of that evidence is still within the exclusive possession of the defendants.

Consequently, discovery in aid of plaintiff's opposition to the motion must be permitted or the motion must be denied. As expressed by Professor Kaplan:

> "Under rule 56(f) the adversary need not even present the proof creating the minimal doubt on the issue of fact which entitles him to a fair trial; it is enough if he shows the circumstances which hamstring him in presenting that proof by opposition to the motion." Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-63 (II)*, 77 HARV. L. REV. 801, 826 (1964).

The requirements of liberal discovery in antitrust actions, combined with liberal granting of rule 56(f) applications, has lead to the outright denial of summary judgment motions in cases where pre-trial discovery is not complete, even where the plaintiff was unable to sustain the allegations of his complaint. *Philco Corp.* v. *Radio Corp. of America*, 34 F.R.D. 453 (E.D. Pa. 1964); *Smith-Corona Marchant, Inc.* v. *American Photocopy Equip. Co.*, 217 F.Supp. 39 (S.D.N.Y. 1963); *cf. White Motor Co.* v. *United States*, 372 U.S. 253 (1963). *A fortiori*, the antitrust plaintiff must be afforded an opportunity for full and complete discovery if he is to be saddled with the burden of proving the existence of a genuine issue as to a material fact on a motion for summary judgment.

In the case at Bar, the district court narrowly restricted discovery. In its opinion of March 30, 1961, the court said that plaintiff's right to discovery should be limited because his claim was "insubstantial" and was based "only on suspicion and on a gossamer inference" (Pltf.'s App. 71-72a). Since this condemnation of plaintiff's case was based upon the presentation of only one side of the motion and was made before plaintiff had had any discovery at all,

plaintiff was, of course, unable effectively to refute it. Plaintiff was subsequently afforded two opportunities to conduct discovery of Cities. The first was meaningless because the witness produced by Cities knew nothing of plaintiff or Iran. The second was so limited in time and scope that plaintiff was able to learn only part of the story. One of the things plaintiff did learn, however, was that W. Alton Jones had meetings during his trip to Iran with alleged co-conspirators. Since none of Cities' witnesses was able to testify what went on at those meetings, plaintiff asked the court for discovery of the other defendants. His application was denied, and summary judgment was granted, despite the fact that even in normal circumstances such discovery would be permitted. As stated by the court in *Radio Corp. of America* v. *Rauland Corp.*, 16 F.R.D. 160, 164 (N.D. Ill. 1954):

> "It is well established that proof of conspiracy entitles the complaining party to prove the origin and purposes of the alleged conspiracy, and it must follow that discovery with regard thereto must be extensive enough to embrace the inception of the conspiracy complained of."

All of the defendants in this action are charged with having entered into one common conspiracy to boycott Iranian oil. Despite this, the courts below restricted plaintiff's discovery to Cities, treating that defendant as if plaintiff's claim against it was a separate lawsuit. The character and effect of a conspiracy, however, can only be judged after plaintiff has had the opportunity to develop the whole picture. *Continental Oil Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). Plaintiff was not given that opportunity.

POINT III

The holding of the lower courts that no issue requiring trial has been shown to exist conflicts with decisions of this Court and of other courts of appeals.

Assuming, *arguendo,* that the lower courts were justified in relieving Cities of the burden of showing that no issue requiring a trial was presented and imposing the burden on plaintiff to show the converse, and assuming also, *arguendo,* that the courts were right in limiting plaintiff's discovery, it was nevertheless error to grant summary judgment, since plaintiff, even on the limited record at his disposal, demonstrated the existence of genuine issues of fact with respect to Cities' participation in the alleged conspiracy.

There is abundant circumstantial evidence that Cities at some point in time became part and parcel of the conspiracy to boycott Iranian oil and, hence, to frustrate plaintiff's attempt to dispose of his Iranian oil and capitalize on his connections with the Iranian government: (1) the opening which plaintiff offered Cities was a golden opportunity, Cities' dream of an independent oil supply about to come true, and Cities went three-fourths of the way toward exploiting the opportunity but then, after conferring with several of the co-conspirators, stopped in its tracks and not only refused to proceed but also intervened to frustrate plaintiff's attempt to dispose of part of his oil to the United States Air Force; (2) Cities' action, taken in apparent contravention of its immediate self-interest in the premises, paralleled and aided that of the other conspirators, who were engaged in an open campaign to boycott all suppliers of Iranian oil; and (3) Cities' chairman of the board reported favorably on the prospects for American reactivation of the Iranian oil industry,

quickly with the cooperation of Anglo-Iranian Oil Company or slowly without it. After the American Petroleum Institute convention, at which the other conspirators threatened to cut off Cities' oil supplies if Cities should pursue its Iranian venture, nothing more was heard of such proposals (Pltf.'s App. 153a).

These facts alone, we submit, are sufficient under the authorities to raise a fact issue as to the existence of a conspiracy in a private antitrust action, but plaintiff went farther. He alleged that the precise inducements offered Cities by the other conspirators for Cities' refusal to deal in nationalized Iranian oil were oil from another source and a participation in the Consortium. The point which we wish to emphasize is that even without proof of the precise inducements for Cities to join the conspiracy, and regardless of whether plaintiff's beliefs on that score were mistaken, plaintiff made a *prima facie* showing of conspiracy. Under the decisions of this Court and the courts of appeals, proof that a defendant, in disregard of its immediate business interests, conformed its business behavior to the alleged conspiratorial purpose, especially when coupled with other evidence of conspiracy, constitutes a *prima facie* showing of conspiracy which will not only defeat a motion for summary judgment (which is the precise question here presented) but will, unless conclusively contradicted, support a finding in plaintiff's favor on that issue. The instant case is a particularly strong one for the application of this rule inasmuch as the general conspiratorial purpose was announced for all to read in the newspapers (Pltf.'s App. 119a). The specific application of the announced boycott to plaintiff and those dealing with him was obvious.

The district court found that (1) plaintiff had failed in his attempt to prove that the other defendants offered

Cities Kuwait oil and a share in the Consortium in order to induce Cities to join the conspiracy and (2) while Cities refused to deal with plaintiff, Cities continued to be interested in Iranian oil (Pltf.'s App. 11-12a). It held, consequently, that plaintiff had not raised a fact issue as to the existence of the conspiracy. The Court of Appeals adopted the reasoning of the District Court. Thus, in their preoccupation with plaintiff's attempt to prove the precise motives which moved Cities, the lower courts lost sight of the fact that plaintiff made a sufficient showing of conspiracy in spite of his inability to prove Cities' motives. That, we respectfully submit, was the origin of the error committed by the two courts in judging the merits of Cities' motion.

The plaintiff's burden of proof on the issue of conspiracy in a civil antitrust action has been the subject of several opinions of this Court and numerous opinions of the courts of appeals. The case law on the subject has been shaped by two considerations: (1) the difficulty of procuring direct evidence of conspiratorial intent ("agreement") because such evidence, if it exists, almost invariably is under defendants' control, and (2) the ease with which defendants, if innocent, may refute the appearance of illegality.

Among the rules which the courts have developed in aid of plaintiffs in this respect, is the rule that, in proper circumstances, an inference of conspiracy may be drawn from proof that a defendant conformed its business behavior to the business behavior of the other defendants with the effect of promoting the alleged conspiratorial purpose. Thus, this Court has held that, while conscious uniform business behavior does not conclusively establish conspiracy, such behavior is "admissible circumstantial evidence from which the fact finder may infer agreement."

Theatre Enterprises, Inc. v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 540 (1954).

Such an inference is fair, for if the suspicion is unjustified, it is within the defendant's power to refute it. The refutation must begin with a denial of participation in the conspiracy. Defendant here has not made even that beginning.

In *Theatre Enterprises,* defendants had refused to license their motion pictures for first runs to plaintiff. Plaintiff, without any supporting facts, drew the conclusion that defendants' uniform action in refusing to deal with plaintiff on a first run basis must have resulted from an illegal agreement among the defendants. Defendants denied the existence of any collaboration, and claimed that their refusal to deal was based on the independent business judgment of each defendant. The trial court denied plaintiff's motion for a directed verdict, and the court of appeals affirmed a verdict for defendants, saying:

> "We think there was evidence to support both of the inferences drawn by the opposing parties to the case and thus an issue was presented which was necessarily submitted to the jury for decision." 201 F.2d 306, 313.

This Court agreed. 346 U.S. at 542. *Theatre Enterprises,* therefore, stands for the proposition that, where conscious uniform business behavior is shown but is counteracted by defendants' denials of any collaboration, a jury question is presented. How much stronger the case for a jury where, as in the instant case, plaintiff not only shows that defendant conformed its business behavior to that of the other conspirators, contrary to its immediate self-interest and in furtherance of the conspiracy, but also adduces other circumstantial evidence of conspiracy, without eliciting a denial from defendant!

Among the decisions cited by this Court in support of its holding in *Theatre Enterprises, Interstate Circuit, Inc.* v. *United States,* 306 U.S. 208 (1939), holds significance for the case at Bar. In that case exhibitors of motion pictures had invited eight distributors to impose certain restrictions on the distribution of their films. The distributors argued that no conspiracy was shown inasmuch as the invitation had been addressed to each distributor individually, but this Court rejected that argument. The Court pointed out that:

> "It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan." 306 U.S. at 226.

Similarly, Cities knew that concerted action was contemplated and invited, and gave its adherence.

In *Interstate Circuit,* this Court held that the inference of conspiracy was supported and strengthened by the circumstance that defendant distributors (as Cities in the case at Bar) failed to call as witnesses any of their officers or agents who knew whether in fact an agreement had been reached among them for concerted action. 306 U.S. at 225.

The Court's holding in *Theatre Enterprises* has been applied with varying degrees of liberality by lower courts, but even under the most illiberal decisions, the case at Bar presents the fact issue of conspiracy, regardless of plaintiff's inability at this time to demonstrate the precise inducement for Cities to join the conspiracy.

In *Morton Salt Co.* v. *United States,* 235 F.2d 573 (10th Cir. 1956), the court, recognizing that parallel business

behavior does not conclusively establish agreement, emphasized that "such behavior is another item to be weighed and generally to be weighed heavily in the determination." 235 F.2d at 577. The court found that the action of one of the defendants, Deseret, in refusing, after conferring with the other defendants, to deal with an outsider was against Deseret's interest "unless it [Deseret] would benefit in other ways from this yielding to the demands of competitors." 235 F.2d at 578. "The natural inference is," the court continued, "that the action was pursuant to the conspiracy and Deseret believed that the long run benefit to it by helping maintain higher price levels was greater than this loss of raw salt business." *Ibid.* The similarity with the case at Bar is obvious: Cities would have benefited greatly from the arrangement plaintiff proposed but chose, after conferring with other conspirators, to give up its immediate advantage. The same "natural inference" that the sacrifice was made in the interest of the conspiracy must be drawn.

In *Nagler* v. *Admiral Corp.*, 248 F.2d 319 (2d Cir. 1957), three different judges of the same court that decided against plaintiff in the case at Bar upheld a complaint although it lacked a direct allegation of conspiracy, on the ground that "as to this the trier of facts may draw an inference of agreement or concerted action from the 'conscious parallelism' of the defendants' acts of price cutting and the like as the Supreme Court recognizes" (citing *Theatre Enterprises*). 248 F.2d at 325.

To the same effect is *Standard Oil Company* v. *Moore*, 251 F.2d 188 (9th Cir. 1957), *cert. denied* 356 U.S. 975 (1958) (see 251 F.2d at 210-211).

Again in *Independent Iron Works, Inc.* v. *United States Steel Corporation*, 322 F.2d 656 (9th Cir. 1963), the court interpreted this Court's holding in *Theatre Enterprises* to

mean that similarity in business conduct has probative significance if present "under circumstances which logically suggest joint agreement, as distinguished from individual action." 322 F.2d at 661. The court upheld a directed verdict for defendants on the ground that the evidence showed a decided lack of uniformity and an absence of interdependence among defendants. *Id.* at 665-66. Hence the court found that no conspiratorial character was cast on defendants' activities. *Ibid.* By contrast, the record in the instant case has ample evidence suggesting agreement and interdependence. Cities' behavior toward plaintiff is cast with an unmistakable conspiratorial quality.

In *Pittsburgh Plate Glass Co.* v. *United States,* 260 F.2d 397 (4th Cir. 1958), *aff'd* 360 U.S. 395 (1959), the court held that defendant's "conscious parallelism," in light of defendant's apparent close connection with the climax of the conspiracy, reasonably permitted the jury to infer that defendant acted in agreement with some or all of the conspirators. The court said:

> "The proposition is too elementary to require elaboration, that participation in a criminal conspiracy need not be proved by direct evidence; 'a common purpose and plan may be inferred from a "development and a collocation of circumstances."' Glasser v. United States, 1942, 315 U.S. 60, 80, 62 S. Ct. 457, 86 L.Ed. 680." 260 F.2d at 401.

In *Rushing* v. *Metro-Goldwyn-Mayer Distributing Corp. of Texas,* 214 F.2d 542 (5th Cir. 1954), the court stated its understanding that the plaintiff's burden of proof on the issue of conspiracy in a civil antitrust action "has been reduced to a point considerably below that in most civil suits," although it is still required that there be at

least circumstantial evidence reasonably supporting an inference of conspiracy. 214 F.2d at 544.

Probably the most restrictive of the authorities is *Delaware Valley Marine Supply Co.* v. *American Tobacco Co.*, 297 F.2d 199 (3d Cir. 1961), *cert. denied* 369 U.S. 839 (1962), where the court affirmed a judgment entered on a directed verdict in favor of defendants. It was plaintiff's contention that he was entitled to a jury trial on the question whether the five defendant tobacco companies had conspired to refuse to sell their products to him. The court emphasized that all of the defendants had denied expressly the existence of any conspiracy, and distinguished *William Goldman Theaters* v. *Loew's Inc.*, 150 F.2d 738 (3d Cir. 1945), *cert. denied* 334 U.S. 811 (1948), by that very fact. 297 F.2d at 206. The court held that "conscious parallelism is not yet a conclusive legal substitute for proof of conspiracy. It is circumstantial evidence the probative value of which necessarily varies with the kind of parallelism and the factual setting where it is found." 297 F.2d at 202, 203. The court held that the uniform action of the tobacco companies in refusing to deal with plaintiff, without corroborating evidence, was insufficient to support a finding of conspiracy, saying:

> "Many of the decisions in which courts find conspiracy on the basis of circumstantial evidence do so because the defendants acted in apparent contradiction of their own economic self-interest. In such cases there was evidence that the plaintiff had made a better offer than did those with whom the defendant was currently doing business, or that the plaintiff's place of business was superior to that supplied by the defendant. No better offer was proven here, nor was it shown that the plaintiff could provide facilities equal to Lipschutz or Kelly [two other distributors]." 297 F.2d at 206. (Footnotes omitted).

It is evident, then, from the court's language that the court would have arrived at the opposite result if the record in that case had contained the additional ingredients present in the instant case of (1) an announced conspiratorial purpose; (2) conflict between the individual defendant's immediate self-interest and its refusal to deal with plaintiff, while such refusal served the announced purpose of the conspiracy; (3) conferences between such defendant and other conspirators before the refusal occurred; (4) acts by defendant to frustrate plaintiff's attempt to sell to a third party; and (5) absence of a denial by defendant of participation in the conspiracy.

To summarize, under decisions of this Court and courts of appeals, the plaintiff in an antitrust action may make a *prima facie* showing of conspiracy by demonstrating that, in refusing to deal with him, a defendant conformed its behavior to that of the other alleged conspirators (*Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537 (1954)), and acted in a manner inconsistent with its own immediate economic interests and consistent with the objectives of the alleged conspiracy (*Morton Salt Company* v. *United States*, 235 F.2d 573 (10th Cir. 1956); and see *Delaware Valley Marine Supply Company* v. *American Tobacco Company*, 297 F.2d 199 (3d Cir. 1961, *cert. denied* 369 U.S. 839 (1962)). While plaintiff does not have to show that defendant communicated with the other conspirators (*Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208 (1939); *Standard Oil Co. of California* v. *Moore*, 251 F.2d 188 (9th Cir. 1958, *cert. denied* 356 U.S. 975 (1958); and see *Nagler* v. *Admiral Corp.*, 248 F.2d 319 (2d Cir. 1957)), as long as he shows that the plan and purpose of the conspiracy were made known to defendant (*Interstate Circuit, Inc.* v. *United States, supra*), his case is strengthened if he can show that defendant did in fact confer

with some of the co-conspirators before refusing to deal with him (*Morton Salt Company v. United States, supra*). Should defendant fail to deny its participation in the conspiracy, plaintiff's case is further supported and strengthened (*Interstate Circuit, Inc.* v. *United States, supra; William Goldman Theatres, Inc.* v. *Loew's Inc.*, 150 F.2d 738 (3d Cir. 1945), *cert. denied* 334 U.S. 811 (1948)). The probative value of such circumstances is to be determined by the trier of the facts (*Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp., supra; Standard Oil Company of California* v. *Moore, supra*). Conspiracy need not be established by direct evidence, but may be inferred from a development and a collocation of circumstances (*Glasser* v. *United States,* 315 U.S. 60 (1942)). The standard of proof required is considerably lower than that in most civil suits (*Rushing* v. *Metro-Goldwyn-Mayer Distributing Corp. of Texas,* 214 F.2d 542 (5th Cir. 1954)).

Or, in the terms of the action at Bar, plaintiff raised a fact issue as to the existence of a conspiracy by adducing evidence tending to show that Cities, although anxious at first to accept the deal offered it by him, made a sudden turnabout after conferring with several of the other alleged conspirators, and thereafter, in contravention of its own interests in the matter, and in obedience to the announced conspiratorial purpose, not only turned plaintiff down but used its influence to frustrate plaintiff's attempt to dispose of some of his oil to the United States government. His case is greatly strengthened by the fact that Cities failed to deny its participation in the conspiracy. Thus, under the applicable authorities, plaintiff has made a strong case for the jury. The decision of the Court of Appeals, denying him a trial, is in conflict with decisions of this Court and other courts of appeals.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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APPENDIX A

Rule 56, Federal Rules of Civil Procedure

Summary Judgment.

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. [As amended Dec. 27, 1946, effective March 19, 1948.]

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. [As amended Jan. 21, 1963, effective July 1, 1963.]

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. [As amended Jan. 21, 1963, effective July 1, 1963.]

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 376—September Term, 1965.

(Argued May 13, 1966 Decided June 6, 1966.)

Docket No. 30144

PATRICIA WALDRON, as executrix of the last will and testament of GERALD B. WALDRON, deceased,

Plaintiff-Appellant,

—v.—

CITIES SERVICE CO.,

Defendant-Appellee.

Before:

WATERMAN, ANDERSON and FEINBERG,

Circuit Judges.

Appeal from summary judgment in favor of defendant in the United States District Court for the Southern District of New York, William B. Herlands, *Judge*. Affirmed.

ANDERSON, *Circuit Judge*:

This is an appeal from a final order of the District Court for the Southern District of New York granting a motion for summary judgment made by the defendant Cities Service Co. and denying the plaintiff Waldron's[1] motion under F. R. Civ. P. 56(b) for further discovery. Cities Service was one of seven major oil companies named as defendants in this treble damages action brought on June 11, 1956 pursuant to §4 of the Clayton Act, 15 U. S. C. §15 (1964 ed.). Stated in general terms, the suit concerns plaintiff's claim that, because of the conspiracy of Cities Service and the other defendants, he was prevented from exploiting his contract for the importation and sale of Iranian oil. The rather involved facts will not be recited here as they have been stated fully and with great care by Judge Herlands in two reported opinions. See, *Waldron* v. *British Petroleum Co.*, 231 F. Supp. 72 (S. D. N. Y. 1964) and *Waldron* v. *British Petroleum Co.*, 38 F. R. D. 170 (S. D. N. Y. 1965) (the decision here appealed from).

We have no question that the order below is appealable. Cities Service was the only party moving for summary judgment, and the court, in conformity with F. R. Civ. P. 54(b), entered an order dismissing the complaint against it. Thus the order is in every sense a final disposition of the suit against Cities Service and is appealable, 28 U. S. C. §1291 (1964 ed.); and there is no reason why this appeal should be withheld during the pendency of the suits against the six remaining defendants, which may not be fully disposed of for several years.

Turning to the merits, we are convinced that as the record now stands the grant of summary judgment to the

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[1] Plaintiff died after the suit was commenced and his widow as executrix has been substituted as plaintiff. For convenience we refer to plaintiff as if the decedent were still alive.

defendant was proper. After nine years in the district court it is plain that the plaintiff has not established the existence of any "genuine issue as to any material fact." F. R. Civ. P. 56(c); see, F. R. Civ. P. 56(e). Indeed, the record is barren of any facts which would support the existence of a claim against Cities Service. *Dressler* v. *MV Sandpiper*, 331 F. 2d 130 (2d Cir. 1964).

While Judge Herlands did restrict the scope of discovery we do not think that he abused his discretion. At various times during this litigation the plaintiff advanced several divergent theories of his case by which he sought to link Cities Service to the alleged conspiracy. First it was his theory that Cities Service was "rewarded" by the others for breaking off negotiations with him concerning Iranian oil. The rewards were said to have been a favorable long term contract for the supply of Kuwait crude oil, and a participation share in the Iranian Oil Consortium. Later plaintiff abandoned that theory and adopted the hypothesis that evidence of a sudden loss of interest by Cities Service in Iranian oil during the later months of 1952 proved that Cities Service had joined with the alleged conspirators. Still later, after having discarded that theory, the plaintiff based his action on the claim that Cities Service interfered with his attempts to sell Iranian oil to the Richfield Oil Company.

Following extensive discovery by Waldron under the Kuwait and Consortium theories, Cities Service first moved for summary judgment on April 8, 1960, but the trial court adjourned the motion and granted Waldron further limited discovery. Plaintiff examined Cities Service's employee who had been in charge of the Kuwait and Consortium transactions. After this additional discovery had been completed Cities Service renewed its motion on May 13, 1963. The complaint was then amended to drop the specific Kuwait and Consortium charges and the plain-

tiff proceeded instead upon a more general allegation of conspiracy. The court again adjourned decision on the motion to permit still further discovery through the examination of several principal officers of Cities Service in order that plaintiff might have an opportunity to look for some support for his "loss of interest" theory. This included discovery of a good deal of additional correspondence. Discovery was also permitted relative to sales of Iranian oil to the Richfield Oil Company. On October 16, 1964 Cities Service again renewed its motion, and the court finally granted summary judgment in September, 1965. Despite these more than ample opportunities to develop a basis for his action, plaintiff has been unable to do so, and has failed to demonstrate the existence of any genuine issue of fact. The court quite properly denied the Rule 54(f) motion for further discovery by which plaintiff sought to engage in still another "fishing expedition" in the hope that he could come up with some tenable cause of action.

We are not unmindful that private anti-trust suits to some extent cast the plaintiff in the role of a "private attorney general" and that such suits are favored, see, e.g., *Lawlor* v. *National Screen Service Corp.*, 349 U. S. 322, 329 (1955); cf., *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 432-433 (1964). Even so, it is apparent in this case that Waldron was given ample opportunity and scope in his shifting programs of discovery. The plaintiff, as a "private attorney general," may not seek indefinitely, within the period of limitations, to use the process to find evidence in support of a mere "hunch" or "suspicion" of a cause of action.

The judgment of the District Court is affirmed.

United States District Court
S. D. New York.
Sept. 8, 1965.

GERALD B. WALDRON, individually and doing business as Consolidated Brokerage, Plaintiff,

v.

BRITISH PETROLEUM CO., LTD., Cities Service Co., Socony Mobil Oil Co., Inc., Standard Oil Co. of California, Standard Oil Co. (New Jersey), Texaco Inc., Defendants.

HERLANDS, District Judge:

The court has before it two motions. The first is the renewal of a motion by defendant Cities Service Co.—initially made in 1960—for summary judgment under Rule 56(e) of the Federal Rules of Civil Procedure on the ground that plaintiff has failed, in his affidavits, to "set forth specific facts showing that there is a genuine issue for trial."

The second motion is by plaintiff[1] for further discovery, pursuant to Rule 56(f) of the Federal Rules of Civil Procedure.

The relevant facts were detailed and analyzed by this court at an earlier stage of this litigation. Waldron v. British Petroleum Co., 231 F.Supp. 72 (S.D.N.Y. 1964). The facts will now be reiterated only to the extent necessary for the disposition of the motions at bar.

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[1] On February 9, 1965, pursuant to Rule 25(a) of the Federal Rules of Civil Procedure, Patricia Waldron was substituted in her capacity as executrix of the last will and testament of the deceased plaintiff, Gerald B. Waldron, as plaintiff in this action.

Defendant Cities Service Co. (hereinafter Cities) first moved for summary judgment on April 8, 1960. In a memorandum opinion by this court, filed March 30, 1961, Cities' motion was adjourned for the purpose of enabling plaintiff to conduct limited pre-trial discovery. At that time, this court said:

> 1. It is doubtful in the extreme whether plaintiff has shown that there is a genuine issue as to any material fact with respect to his claim against the defendant Cities Service Co.
>
> 2. The naming of Cities Service Co. as a defendant herein when the complaint was drawn was based only on suspicion and on a gossamer inference drawn from the mere sequence of events.
>
> 3. But for the prevailing strict policy in this circuit with respect to the invocation of the summary judgment procedure, the court would have granted the motion. This court has examined virtually every reported summary judgment decision rendered in this circuit since Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946), over one thousand in number. The rationale and philosophy of Arnstein v. Porter have not been attenuated by the subsequent course of decisions.
>
> 4. In view of (a) the surface complexity of the case, (b) the indirect law enforcement aspects of even this private antitrust case, (c) the very extensive pre-trial examinations of the plaintiff already conducted by the defendants and the complete absence of any pre-trial examination of any defendant by the plaintiff —it would appear to be fair to postpone a decision of the summary judgment motion and to afford the plaintiff an opportunity to engage in appropriately supervised discovery and related pre-trial proceedings.

5. Because of plaintiff's claim against the defendant Cities Service Co. is, judged by the entire available record, so insubstantial, the plaintiff will not be given carte blanche authority to conduct untrammeled pretrial proceedings. Such proceedings will be closely regulated. The usual Federal rule permitting fishing expeditions will be curtailed. A just and workable balance will be maintained between the respective interests of the opposing parties.

Following plaintiff's exhausting the discovery permitted pursuant to an order filed May 4, 1961,—limiting plaintiff to the examination of George H. Hill, Jr.—Cities again renewed its motion for summary judgment on May 13, 1963. At that time, plaintiff also moved for further discovery under Rule 56(f).

In deciding the 1963 renewal of Cities' motion for summary judgment, the court no longer was to be controlled by the rather restrictive interpretation of Rule 56 articulated by this circuit in Arnstein v. Porter, supra. Instead, the court was to be guided by two recent developments with respect to Rule 56, which had taken place since the March 30, 1961 decision herein.

The first development was the amendment to Rule 56(e), effective July 1, 1963. Although the central target of the amendment was to overcome a judicial gloss placed upon Rule 56 in the Third Circuit which had impaired the utility of the summary judgment device, 6 Moore, Federal Practice 149 (1964 Supp.), the amendment was also aimed at the line of decisions in the Second Circuit, following Arnstein v. Porter, which reflected a strict policy toward the granting of summary judgment. See Wright, Rule 56(e): A Case Study On The Need For Amending The Federal Rules, 69 Harv.L.Rev. 839, 856 (1956); United States v. Manufacturers Casualty Ins. Co., 158 F.Supp.

319, 321 (S.D.N.Y. 1957); Vermont Structural Slate Co. v. Tatko Bros. Slate Co., 134 F.Supp. 4, 5 (N.D.N.Y.1955), aff'd 233 F.2d 9 (2d Cir. 1956).

The second development was exemplified by the decision in Dressler v. MV Sandpiper, 331 F.2d 130 (2d Cir. 1964). In that case the court of appeals, in an opinion written by Judge Kaufman, undertook to resolve any doubt as to the effect of the 1963 amendment on the Second Circuit doctrine that had evolved from Arnstein v. Porter.

Judge Kaufman first made it clear that the amendment was aimed at changing the rule in this circuit as well as that of the Third Circuit. He then formulated, at 133, the criterion to be applied under the amendment in passing upon a motion for summary judgment:

> If the present case were to be decided under Civil Rule 56 as amended, it would thus seem clear that respondent's vague and conclusory allegations * * * would not be sufficient to forestall the award of summary judgment. The highly general assertions of * * * [the] answer * * *, buttressed by no *specific facts* or *evidentiary data*, are hardly the sort of *concrete particulars* which the amendments sought to require. [Emphasis added.]

Recent cases in this circuit which have reversed the granting of summary judgment have not manifested any deviation from the standards enunciated in Dressler. See United States v. Fair & Co., 342 F.2d 383, 385 (2d Cir. 1965); Miller v. General Outdoor Advertising Co., 337 F. 2d 944, 948 (2d Cir. 1964). For example, the court stated in Miller, at 948:

> We do not, by our disposition of this case, weaken the force of our recent holdings that the summary judgment procedure should be used to pierce the alle-

> gations of pleadings and screen out sham issues of fact. See, e. g., Dressler v. MV Sandpiper * * *.

In an opinion, reported 231 F.Supp. at 72, this court, in order to enable plaintiff to meet, if possible, the new demands of Rule 56(e), further adjourned Cities' motion and granted plaintiff's motion for further discovery, permitting examination of Burl S. Watson, A. P. Frame, and J. E. Heston. In allowing this further discovery, the court stated, at 94:

> Since plaintiff must—if he is to oppose successfully Cities Service's summary judgment—eventually submit "specific facts" which "would be admissible in evidence" [Rule 56(e)], plaintiff should be given another opportunity to conduct pretrial discovery.

Plaintiff has now completed the examinations of Watson, Frame and Heston. Cities again renews its motion for summary judgment.

The single issue before the court relating to Cities' motion for summary judgment is whether plaintiff's discovery has unearthed a "genuine issue [of fact] for trial" where nothing had existed before but "suspicion" and "gossamer inference drawn from the mere sequence of events."

The sequence of events to which plaintiff points as the basis of linking Cities with the alleged conspiracy is that in August, 1952, W. Alton Jones, president of Cities, allegedly expressing great interest in the prospects of reactivating Iranian oil, flew to Iran to confer with Dr. M. Mossadegh, the prime minister of Iran. Then,

> in late September, 1952, Jones returned to the United States. He appeared to have suffered a complete change of heart and mind. He refused to have any

> further dealings with plaintiff. Ostensibly he lost all interest in purchasing or managing Iranian oil [231 F.Supp. at 79-80].

Plaintiff attributes this "change of heart and mind" to the fact that somewhere between late August and early September, 1952, Cities joined the alleged conspiracy. Plaintiff earlier speculated that the alleged incentive for Cities to join the conspiracy was the promise of a contract between Cities and Gulf Oil Co. for oil from Kuwait, signed shortly after the above-noted events, or an opportunity advanced to Cities by the other defendants to participate in the oil consortium formed several years after the above-noted events.

The examinations of Watson, Frame and Heston have not produced any evidence from which a trier of fact would be permitted to infer that the Kuwait oil contract and participation by Cities in the consortium were consideration for Cities' allegedly dropping its interest in Iranian oil and joining the alleged conspiracy against plaintiff. On the contrary, the record, as it now stands, conclusively establishes that both the Kuwait contract and participation in the consortium had no connection whatever with the course of Cities' conduct with regard to Iranian oil.

Plaintiff's major premise throughout this litigation with regard to Cities has been that, for some reason, Cities did a complete turnabout with respect to its interest in Iranian oil. Not only has the evidence thus far adduced demonstrated that the alleged turnabout was not motivated for the reasons originally advanced by plaintiff, but the evidence has brought into serious doubt the existence of the major premise itself—a turnabout or change in attitude. Rather, the evidence persuasively demonstrates a consistent course of conduct by Cities with regard to Iranian oil at all times.

Granting, however, arguendo, that there is an issue of fact as to whether Cities inexplicably changed its mind about Iranian oil, such an issue is insufficient as a matter of law to constitute a "genuine issue for trial." From a possible inference that there was an unexplained change of mind on Cities' part, a trier of fact would not be permitted to draw the further inference that the change of mind was caused by a conspiratorial connection between Cities and the alleged co-conspirators.

The crucial facts which plaintiff must produce in order to survive Cities' motion for summary judgment are evidentiary data tending to prove that Cities became a party to the alleged conspiracy. These evidentiary data have not been forthcoming. Even the "gossamer inference" that existed in 1961 has become attenuated into nothingness as a result of the pre-trial record developed during the last four years.

Plaintiff has been permitted to examine all of those persons, still living, who accompanied Jones to Iran in August, 1952 and who would be able to link Jones' activities at that time with the alleged conspiracy.

The examinations, however, have done no such thing. Plaintiff maintains, however, that—so long as there is the slightest question as to Jones' motive in allegedly abandoning his interest in Iranian oil—there is a material issue of fact remaining to be tried and, hence, that defendant's motion for summary judgment must be denied.

In so arguing, plaintiff relies heavily on Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962). Although Poller antedates the 1963 amendment to Rule 56(e) of the Federal Rules of Civil Procedure, it is unnecessary for the disposition of the present case to determine whether the result in Poller would have been the same after the 1963 amendment.

The facts in Poller, simplified for purposes of the present motion, are as follows. Plaintiff owned a broadcasting station in Milwaukee, affiliated with the Columbia Broadcasting System (CBS) network. Plaintiff claimed that, as part of a conspiracy to drive plaintiff out of the Milwaukee broadcasting market, CBS purchased the plaintiff's only competitor in Milwaukee and then cancelled its (CBS's) affiliation agreement with plaintiff (pursuant to an option clause in the affiliation agreement), ultimately causing plaintiff, no longer able to compete, to liquidate at distress prices.

The *only* question was whether CBS's purchase of plaintiff's competitor and cancellation of the affiliation agreement was for an illegal purpose or motivated by legitimate business judgment. The facts of purchase, cancellation and their having directly caused injury to plaintiff were not disputed.

In holding that the granting of summary judgment was improper in Poller, the court stated, at 473, 82 S.Ct. at 491:

> We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice."

Plaintiff also relies upon Cross v. United States, 336 F.2d 431 (2d Cir. 1964), a decision which post-dates the 1963 amendment to Rule 56(e). In that case, as in Poller, the district court's granting of summary judgment was reversed as "particularly inappropriate where 'the inferences

which the parties seek to have drawn deal with questions of motive, intent and subjective feelings and reactions.'" But in Cross, as in Poller, the *only* issue was to determine the purpose or motivation behind certain undisputed acts.

Plaintiff's argument (authority for which it relies upon Poller, Cross, and other similar cases) is essentially this: if plaintiff can raise an issue of fact as to whether a defendant who has been, independently of plaintiff, pursuing a course of conduct harmonious with that of plaintiff—and incidentally inconsistent with that of a conspiracy directed against plaintiff—, reversed that course of conduct so that it then became inconsistent with plaintiff's interests and consistent with those of the conspiracy, then plaintiff has an action for conspiracy against that defendant which is immune against a motion for summary judgment.

In all of those cases relied upon by plaintiff, however, where the credibility of witnesses was in issue, all that stood between plaintiff and a victorious verdict was a favorable determination by the fact trier of the sole issue of credibility.

However, in the present case, the issue of credibility (if there be one) is whether Cities did change its attitude toward Iranian oil. If, arguendo, the jury should find that there was a switch in Cities' attitude, such a finding—without further evidence linking Cities to the alleged conspiracy and the alleged injury to plaintiff—would be insufficient as a matter of law to support a verdict in plaintiff's favor.

On that evidence alone Cities would be entitled to a directed verdict at a trial. It is now entitled to summary judgment. Schwartz v. Associated Musicians of Greater N. Y., Local 802, 340 F.2d 228 (2d Cir. 1964); Dressler v. MV Sandpiper, supra; Scolnick v. Lefkowitz, 329 F.2d 716 (2d Cir.), cert. denied, 379 U.S. 825, 85 S.Ct. 49, 13 L.Ed.2d 35 (1964).

Although the court has determined that there is not a "genuine issue for trial" and that Cities is thus entitled to summary judgment, the court will enter summary judgment only "if appropriate." Fed.R.Civ.P. 56(e).

The next question, therefore, is whether summary judgment dismissing the complaint against Cities is to be entered now or whether Cities' motion for summary judgment is to be again postponed in order to grant plaintiff further discovery under Rule 56(f). See Kaplan, Amendments of the Federal Rules of Civil Procedure, 1961-1963 (II), 77 Harv.L.Rev. 801, 826-27 (1964).

In view of the dual policies of favoring private antitrust actions, see, e.g., J. I. Case Co. v. Borak, 377 U.S. 426, 432-433, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964); Monarch Life Ins. Co. v. Loyal Protective Life Ins. Co., 326 F.2d 841, 845, 846 n. 2 (2d Cir. 1963), cert. denied, 376 U.S. 952, 84 S.Ct. 968, 11 L.Ed.2d 971 (1964), and of protecting a plaintiff's right to his day in court, this court has heretofore granted plaintiff's motions under Rule 56(f). See the earlier decision of this court in this litigation, 231 F.Supp. at 94.

In so doing, the court has been equally aware of a countervailing policy against the undue harassment of a litigant through a spurious law suit. A defendant, no less than a plaintiff, is entitled to the equal protection of the court.

The case against Cities has gone far enough. More than five years have elapsed since Cities first made this motion for summary judgment. Plaintiff has had ample time and opportunity to discover and present "concrete particulars" demonstrating that there is a genuine issue for trial. At this late day plaintiff still cannot point to "specific facts or evidentiary data." Dressler v. MV Sandpiper, supra, 331 F.2d at 133. The court "is convinced to a legal certainty" that plaintiff has no case against Cities. Cf. Arnold v. Troccoli, 344 F.2d 842, 845 (2d Cir. 1965).

Defendant Cities' motion for summary judgment dismissing the complaint as to it is hereby granted.

Plaintiff's motion for further discovery under Rule 56(f) is hereby denied.

So ordered.